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No. 90-1139

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tennessee "Hired Gun" Statute, Tennessee Code Annotated § 8-7-401, which permits private attorneys to participate in public prosecutions violates both the due process and equal protection provisions of the United States Constitution.

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No. 90-1139

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Petition for Writ of Certiorari To the Court of Criminal Appeals of Tennessee

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The petitioner, Steven Bennett, respectfully submits this reply to the respondent's brief in opposition to the petition for writ of certiorari filed in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee is attached to the petition as part of the appendix. The opinion has been published. State v. Bennett, 798 S.W.2d 783 (Tenn.Crim.App. 1990).

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on June 7, 1990. On October 15, 1990, the Supreme Court of Tennessee denied petitioner's application for permission to appeal. Petitioner now seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The petitioner, Steven Bennett, was convicted of murder in the second degree and subsequently sentenced to seventeen years imprisonment.

Mr. Bennett appealed his conviction to the Court of Criminal Appeals of Tennessee, which affirmed the conviction on June 7, 1990. Mr. Bennett then filed an application for permission to appeal to the Supreme Court of Tennessee which was denied on October 15, 1990.

Mr. Bennett thereafter timely filed a petition for writ of certiorari before this Court. A reply to the State of Tennessee's brief in opposition to Mr. Bennett's petition is now respectfully submitted.

ARGUMENT

I. THE TENNESSEE "HIRED GUN" STATUTE VIOLATES DUE PROCESS BOTH AS WRITTEN AND AS APPLIED TO PETITIONER STEVEN BENNETT'S CASE.

In its brief in opposition to Steven Bennett's petition for writ of certiorari, the State of Tennessee, no doubt unintentionally, has mischaracterized Mr. Bennett's argument by stating that Mr. Bennett challenged Tennessee Code Annotated § 8-7-401 as violative of due process on its face and violative of equal protection as applied. (Brief in Opposition, p. 3). In fact, Mr. Bennett has challenged the statute as violative of due process as written and as applied, as well as violative of equal protection as applied. (Petition, p. 26-43).

The respondent avoids the issue of whether Tennessee Code Annotated §

8-7-401 was unconstitutional by couching the issue as requiring "prosecutorial misconduct." In so doing, the respondent overlooks this Court's repeated admonitions that "justice must satisfy the appearance of justice."[1] By allowing Steven Bennett to be prosecuted for the death penalty by a tandem of public and private prosecutors, Tennessee Code Annotated § 8-7-401 certainly failed to satisfy the "appearance of justice," nor was it in fact just.

The respondent further asserts that "[t]here has been no showing that the district attorney general would have handled the case any differently if the victim's family had made their wishes known personally. . . ." This assertion simply does not bear scrutiny. The district

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[1] In re Murchison, 349 U.S. 133, 136 (1955), quoting, Offut v. United States, 348 U.S. 11, 14 (1954).

attorney general did not seek the death penalty against Steven Bennett until after he had been approached and requested to do so by the two privately retained prosecutors.[2] The district attorney general only then filed a belated notice to seek the death penalty, citing but one, spurious aggravating circumstance which was

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[2] The respondent further concludes that the private counsel retained by the family of the victim "volunteered" their services for the trial during a condolence call. (Brief in Opposition, pp. 7,9). Nowhere is there support for such a conclusion. The record is silent as to whether the private prosecutors were paid a retainer or whether in an unusual act of charity they both volunteered their services for the lengthy trial that followed. Assuming, arguendo, that counsel for the victim's family was not paid, the inherent ethical conflict between the public and private interests still existed. The unsettling prospect remains that unpaid volunteers might if anything be more over zealous in their work than those who are motivated by more straight forward pecuniary interests. A complete copy of the evidentiary record concerning the private prosecutors is attached in the Appendix.

never supported by the evidence.

(Petition, 4-5).

Thus, the immediate impact of the private prosecutors at the very outset of the trial belies any statement by the respondent that the district attorney general would not have "handled the case any differently".[3]

The State of Tennessee further asserts that no "actual conflict" was

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[3] Respondent makes two other questionable statements about the nature of the record. The respondent states that "before trial, the petitioner requested a stipulation regarding the control of the prosecution." The record reflects that the request for a stipulation concerned the circumstances under which the State sought the death penalty, not that the State had relinquished control over the case. The State further argues that the assistant district attorney affirmed on the record that his office "made all decisions in a fair and non-prejudicial manner". (Brief in Opposition at p. 4). It is scarcely likely, under the circumstances of this case, that the representative of the State would have said anything else.

present for the privately retained prosecutors and thus there was no due process violation. (Brief in Opposition, p.5,). The State cites several federal cases for the proposition that the presence of private prosecutors is not a per se constitutional violation, absent an actual conflict of interest or other misconduct.[4] It bears noting that the cases cited by respondent involve collateral appeals, and that the respondent neglects to address those sister states which have held on direct appeal that the involvement of a private prosecutor is a per se violation of a defendant's constitutional rights.[5] "It

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[4] See e.g., Jones v. Richards, 776 F.2d 1244 (4th Cir. 1985); Stumbo v. Seabold, 704 F.2d 910 (6th Cir. 1983); Woods v. Linahan, 648 F.2d 973 (5th Cir. 1983); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967).

[5] In the United States, several states have condemned the private practice. See, e.g., State v. Harrington, 534 S.W.2d 44 (Mo. 1976)(held unconstitutional); McKay v.

has . . . long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."[6]

State, 90 Neb. 63, 132 N.W. 741 (1911)(held unconstitutional); Biemel v. State, 37 N.W. 244-248 (Wis. 1888)(held unconstitutional); Meister v. People, 31 Mich. 99 (1875)(held unconstitutional); Commonwealth v. Williams, 56 Mass. (2 Cush) 582 (1849)(limited to "peculiar circumstances" or "some stringent reason"); Born v. State, 397 P.2d 924 (Okla.Crim.App. 1964)("frowned upon" by Court); State v. Jensen, 178 Iowa 1098, 160 N.W. 832 (1917)(prohibited where attorney involved in civil and criminal matters arising from some facts); State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951)(prohibited if involved in civil and criminal matters); Cantrell v. Commonwealth, 229 Va. 387, 329 S.E.2d 22 (1985)(private prosecutors hired by family of murder victim held to violate due process under Virginia constitution). While these opinions are certainly not binding on this Court, they are persuasive authority for the proposition that the use of private prosecutors in criminal cases is an archaic practice that should now be terminated by this Court.

[6] United States v. Addonizio, 442 U.S. 178, 185 (1979).

Moreover, the cases cited by the respondent underline the dangers involved in the use of private prosecutions. In Woods v. Linahan, the Court said,

> While we find no error is shown in this case, we note our concern about the practice of using a private attorney, paid by the family and friends of the victim, to prosecute persons accused of murdering a person dear to the people paying the private prosecutor. Human experience indicates that an attorney who is paid by a group of people to provide a service has some loyalty to those persons paying his fee. This loyalty may serve to prejudice the well recognized rights of a defendant accused of committing a crime.[7]

[7] 648 F.2d 973, 977 (5th Cir. 1983) (emphasis added).

Similarly, the Fourth Circuit in Ganger v. Peyton,[8] observed:

> At common law, a prosecuting attorney 'is the representative of the public in whom is lodged a discretion . . ., which is not to be controlled by the courts or by an interested individual.'[9]

Thus, the federal courts have warned of the same inherent dangers that exist in this case where prosecutors, public or private, engage in a prosecution with conflicting interests.

The respondent seeks to distinguish the very cases it cites by asserting that no "actual" conflict of interest existed in this case. It states that "the family's interest in conviction

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[8] 379 F.2d 709, 714 (4th Cir. 1967).

[9] Id. at 713 (emphasis in original).

was consistent with the state's interest in conviction." (Brief in Opposition, p.7).

This Court has often regularly held that the State's interest in a prosecution is not to seek a conviction as the respondent suggests; rather, the state's objective is to see that justice is done.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[10]

[10] Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added); see also, Young v. United States Ex Rel. Vuitton Fils S.A., 481 U.S. 787 (1987) (Blackmum,J. concurring).

This sentiment is echoed in the American Bar Association Model Code of Professional Responsibility, E.C. 7-13:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.[11]

Thus, the interests of the State and the interests of the victim's family in the prosecution of Steven Bennett were not "consistent". To the contrary, they could not have been more disparate.

The district attorney general was present to ensure that justice was done. The lawyers employed as private prosecutors were present to see Steven Bennett convicted and put to death.

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[11] A.B.A. Code of Professional Responsibility E.C. 7-13 (emphasis added).

II. THE TENNESSEE "HIRED GUN" STATUTE DENIED STEVEN BENNETT EQUAL PROTECTION OF THE LAWS.

This Court has made it unmistakably clear that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[12]

The State of Tennessee asserts that Griffin v. Illinois, has no application to the instant case and that carried to its "logical" extreme, Mr. Bennett's argument is that the equal protection clause is violated any time a defendant is prosecuted by a governmental entity that has greater resources than the defendant. (Brief in Opposition, p. 8). Again, the respondent misapprehends the nature of Mr. Bennett's claim.

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[12] Griffin v. Illinois, 351 U.S. 12, 17-19 (1956).

Mr. Bennett does not insist that equal protection is denied whenever the state has greater resources than the defendant; indeed, it is difficult to imagine any prosecution wherein the State or governmental entity does not have greater resources than the individual defendant.

This, however, is not the effect of Tennessee Code Annotated § 8-7-401. Instead, it permits one man to be singled out for disparate treatment at the hands of the combined resources of the state and an additional outside party. It is this treatment that unfairly singled out Steven Bennett for a prosecution by a tandem of public and private prosecutors driven by public and private resources. The process and result were thus in a very real sense dictated by the disparate resources possessed by both the public and private

parties, bringing to bear the same evils feared in Griffin v. Illinois.[13]

The State of Tennessee further seeks to minimize the impact of the private prosecutors by insisting that the prosecution was "consider[ably] burden[ed]" by the quality of Mr. Bennett's defense. The State suggests that the prosecutor's office thus "needed" the resources of a private family to meet this "burden". (Brief in Opposition, p. 8-9).

In so arguing, the State does a disservice to the facts and the law. As a matter of record, trial counsel for the defense entered the case only after the private prosecutors had persuaded the State to seek the death penalty. Thus, it was Mr. Bennett not the State who required the

[13] 351 U.S. 12 (1956).

experienced counsel to meet the "burden" of a death penalty trial.

More important however, where error of constitutional magnitude is present and a citizen has been denied the fundamental protection which our Constitution seeks to afford, the presence or quality of any particular counsel is of no consequence. The harm that has occurred remains. The Constitution does not concern itself with whether a party was well represented, it concerns itself with whether the fundamental values of this society have been preserved in its Courts.

The State further seeks to divert attention from the central constitutional question by an emotive claim that the evidence supported a conviction of second degree murder, arguing that the deceased was a "helpless, retreating boy". The State overlooks the fact that this same

"helpless, retreating boy" was a seventeen year old high school senior who had just attempted to perpetrate a murderous assault on two mothers and their four helpless children. The State further overlooks the remaining evidence which might well have supported a verdict of justifiable homicide or invcluntary manslaughter had the jury not been conditioned by two private prosecutors and one assistant district attorney to consider the death penalty in a case in which this ultimate form of punishment was never warranted by the law or the facts.

The fact that the jury did not condemn Steven Bennett to death but instead returned a verdict on a lesser charge, does not obviate the constitutional harm that was committed in this case. Steven Bennett was wrongly and impermissibly singled out for disparate treatment - treatment rarely

imposed on other individuals in the State of Tennessee. This disparate treatment constituted a denial of equal protection of the laws.[14]

III. CONCLUSION

Justice is a process, not a result. The impartiality and integrity of our judicial process is poisoned by the slightest suggestion that private partisan interests should be given a visible role in the public prosecution of public wrongs. The medieval system of prosecution by private parties no longer is condoned in

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[14] Almost jeeringly, the State suggests that Steven Bennett is not a man of limited means because he continues to be represented by private counsel. As the record of the sentencing hearing clearly reflects, counsel agreed to represent Mr. Bennett on a pro bono basis on appeal, after the trial court found Mr. Bennett was indigent. Old fashioned as it may seem, indigent citizens represented by private counsel are still permitted to appeal meritorious claims "all the way to the Supreme Court", even if their lawyers are unpaid.

England, its birthplace, nor in the courts of this Republic. It is more than timely for this Court now, as a question of first impression, to exercise its jurisdiction over this case and ultimately end this unseemly and insidious practice from the ancient past.

Respectfully submitted,

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THE COURT: The Court will take the motion under advisement. Now, there are three Motions Regarding Private Prosecutors. A Motion Regarding the Constitutionality of the Act and two Motions to Excuse the Private Prosecutors. Mr. Fels, what do you say?

MR. FELS: Your Honor, with regard to the first of the three, that is to say our number three, we would request permission to have a short evidentiary hearing to make a -- as a matter of record the argument which we have set forth orally at the conclusion of that. With regard to issue four and five, tabs four and tabs five, those are questions of law that we are prepared to argue at any time the Court wished to hear those arguments.

THE COURT: Would you outline the evidence you seek to introduce?

MR. FELS: Yes, Your Honor. Respectfully, we would seek to call on Mr. Thomas or Mr. Cunningham for the purpose of establishing that they have been requested to represent the family of Lance Russell in this. That as a result of that request they have, in fact, conferred with the District Attorney's Office and communicated the view that the death penalty should be sought on the facts of this case. That as a result in part at least of those consultations, the State decided some two weeks before the last trial date to seek the death penalty. That Mr. Thomas has been in practice in Blount County for approximately ten years, has been active in the affairs of the Democratic Party, is presently serving on the State wide

Executive of the Democratic Party. That his law partner, Mr. Cunningham, is equally well known and has been equally active in the affairs of the Republican Party, and serves as the chairman of the Republican Party for Blount County. That as a result of their active practice in Blount County, and as a result of their commendable interest in the political system, they personally can be expected to know a number of members of the venire in addition to those that might be known by the District Attorney General Ballard. That as a result of their active practice here in private work, they might also be expected to know a wide number of individual members of the venire. And that, finally, their duties to their private client, that is to say the family of Lance Russell . . .

THE COURT: Are you discussing an evidentiary matter at this point?

MR. FELS: Yes, Your Honor.

THE COURT: On duty?

MR. FELS: Yes.

THE COURT: What -- very well. Proceed.

MR. FELS: That there are areas in which their duty to their client might come in conflict with the American Bar Standards governing the function of the prosecution in criminal cases. If, in fact, counsel would agree that that is an accurate statement, we'd be prepared to proceed by means of that proffer, rather than by the necessity of actually calling that testimony.

THE COURT: Gentlemen, are you prepared to stipulate any of the matters?

MR. HAWKINS: Yes, Your Honor, we . . .

THE COURT: What can you stipulate, General?

MR. HAWKINS: If I could have just a second, if the Court please?

THE COURT: Very well. --

MR. HAWKINS: If the Court please, we can stipulate everything Mr. Fels said with one exception, that we insist and do not stipulate that the only reason that the aggravating circumstance was filed by the District Attorney General was because Mr. Thomas and Mr. Cunningham related that's what the family wanted. That there was also -- and is factual basis for that, and that is the reason that the aggravating circumstance was filed. And we differ with regard to Mr. Fels on that, if I understood him correctly.

MR. FELS: Your Honor, I think there may be a misunderstanding there. I think my statement was, that as a result of that representation in part the decision was made. I did not seek to attribute the District Attorney quite the same impact as the statement Mr. Hawkins has made.

MR. HAWKINS: Well, if the Court please, we would stipulate that the request was made. But again, we do not seek to stipulate that in any part that it plays a difference in whether an aggravating circumstance is so filed.

THE COURT: What . . .

MR. HAWKINS: But the rest of it we can stipulate.

THE COURT: With regard to the stipulation about the conflict on duties?

MR. HAWKINS: Perhaps I didn't understand the Court?

THE COURT: Well, are you -- as I understood the statement of Mr. Fels, he says he will intend to offer proof that the obligation of the private prosecutor to his client comes in conflict with the obligations, the ethical obligations of a State prosecutor.

MR. HAWKINS: Well, if the Court please, we do not stipulate that in this particular case. And we would further state that our evidence would be that the District Attorney General's Office is the one deciding the issues with regard to the case with regard to discovery and evidentiary and all of those standards that apply to prosecutors, and that the -- Mr. Cunningham and Mr. Thomas are representations of the State only at the discretion of the District Attorney General's Office. And we do not believe

the evidence will so show that the way they're handling this case comes in conflict with the standards imposed on prosecutors.

THE COURT: All right. There are two areas that are not stipulated. In that event you may want to call witnesses, Mr. Fels.

MR. FELS: Thank you, Your Honor. Can I confer -- consult with Mr. Black a moment?

THE COURT: You may. --

MR. FELS: Yes, Your Honor. We would request permission to call Mr. Thomas briefly for this purpose.

THE COURT: Very well. Mr. Thomas, take the witness stand. You may testify as an officer of the Court.

MR. THOMAS: Thank you, Your Honor.

MR. FELS: We certainly waive the oath, Your Honor.

THE COURT: Pardon?

MR. FELS: We certainly waive the oath.

D. Kelly Thomas, Jr. was called, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FELS:

Q For the record, sir, your name and place of employment?

A D. Kelly Thomas, Jr. I'm employed in Blount County as an attorney.

Q And how long have you been employed as an attorney in the State of Tennessee?

A Ten years.

Q And during the course of that ten years, sir, have you ever previously acted

as a private prosecutor in the State of Tennessee?

A I don't believe I have.

Q Have you ever acted as a prosecutor of any kind in the State of Tennessee?

A No.

Q Are you familiar with the ethical standards applied to prosecuting officials by the A.B.A. standard for the prosecution?

A I am only familiar with the theory, not the specific standards.

Q Are you familiar with the theory, sir, that a prosecutor is charged with the duty to pursue both the innocent and the guilty equally and when the prosecuting official perceives that injustice may be done to the innocent, to terminate a prosecution?

A Yes.

Q Is it true, sir, that you have been requested by the family of Lance Russell to serve as a private prosecutor in this case, along with your partner Mr. Jerry Cunningham?

A That's true.

Q And as part of your representation have you been requested to seek the death penalty on behalf of the family?

A We have been requested on behalf of the family to imprt that feeling to the Attorney General's Office.

Q And have you done that, sir?

A We did that.

Q All right. And did you do that because that was the request of your client?

A In part.

Q And after you made that representation to the District Attorney's Office, did the District Attorney's Office subsequently seek the death penalty?

A Oh, yes. It was sometime after we'd made the -- gave them the information.

Q As a private prosecutor in this case, is it your intention and the intention of your law partner to engage as vigorously and as fully as possible in the trial of this case under the director of the District Attorney?

A We will certainly do whatever General Ballard allows us to assist him to the best of our ability.

Q And on behalf of your client, is your -- is it your intention to seek to argue that the death penalty is appropriate in this case?

A If the facts of the case get to the point where that argument is relevant and if we feel at that time that the facts justify it, then we will of course do that.

Q In fact that is your mission on behalf of your client, is it not?

A No. That's a part of it at this point, but that's not all of it.

Q So, it is fair to say that it is part of your mission on behalf of your client to seek the death penalty in front of a jury in this case?

A Assuming that the facts are justified -- justify it and that the Attorney General concurs.

Q Just briefly, sir, you have been active in the affairs of the Democratic Party, is that correct?

A That's true.

THE COURT: I understand all of that matter is stipulated.

MR. FELS: Thank you, Your Honor. We have nothing further, Your Honor.

THE COURT: Any questions?

MR. HAWKINS: We have no questions.

MR. BLACK: May I ask a question, Your Honor. I don't know if that's the proper order.

THE COURT: You may.

DIRECT EXAMINATION

BY MR. BLACK:

Q Mr. Thomas, and of course you -- I'm not sure it's in the record, but you and Mr. Cunningham practice law together, is that correct?

A That's true.

Q And have you and Mr. Cunningham collectively been employed for the purpose

of securing a conviction in this case on behalf of the family?

A We have not been employed.

Q Okay. Have you been . . .

A I believe Mr. Fels' question more accurately set that out.

Q Okay. You're -- have you been retained on behalf of the family?

A We've been requested to assist in the prosecution by the family and said we would.

Q All right. Is there an attorney client relationship between your firm and the family?

A I believe there is.

Q And as a part of that attorney client relationship have you been requested and is it a part of your job as you understand that attorney client relations

hip to seek and secure a conviction in these two cases?

A Our job is to help the Attorney General prosecute this case and at this point that is to get a conviction.

Q And that's what you've been asked to do?

A That's what we've been asked to do, is to help the Attorney General.

Q Have you been asked to seek a conviction?

A Yes, assuming the case goes to trial.

MR. BLACK: All right. That's all.

MR. HAWKINS: I have no questions.

THE COURT: You may step down, Mr. Thomas. Call your next witness.

MR. FELS: That would conclude our proof in this regard, Your Honor.

THE COURT: Very well. You may present further argument.

MR. FELS: Thank you, Your Honor. Your Honor, the thrust of this argument is not so much the Constitutionality of the statute itself, although we have grave questions about that. It is not so much the question as to when by terms of the statute an individual becomes a victim of crime and can retain private counsel, although we have concerns about that, but the thrust of this motion is rooted in due process and equal protection and has to do with fundamental fairness in a death penalty case. In sum, Your Honor, four highly seasoned prosecuting counsel seek the death of a truck driver with an eighth grade education. I would not for a moment

afford any man the opportunity to represent my client. And if your Honor says that this is to be four against one, I shall do my steadfast best to represent the interest of Steve Bennett. But in many respects, Your Honor, given the wealth and talent I see across from this Courtroom, I'm reminded of shooting fish in a barrel, except that in this case there's only one fish, it's a small barrel, and there are four people that are taking aim in it. Fundamentally, Your Honor, it's not fair, it's not right for some individual Defendants in our system to be singled out for this extra special attention. If it were this law would permit families of substance or means, I'm not saying that's the case in this case, but it would permit families of substance or means who feel outrage, understandably, to retain the most

famous, the most competent private counsel in their jurisdiction to assist already highly experienced, well respected, public prosecutors. And the difficulty with that is that private motives for the prosecution can become inextricably intertwined with public motivation for a public prosecution. Whether that happened or not in this case is not for us to say. I have the highest respect for the four individuals who are across the Courtroom from me. And I am confident that if anyone would try to avoid that intermixture it is Mr. Ballard, Mr. Hawkins, Mr. Cunningham, and Mr. Thomas. But inevitable when lawyers are retained to seek the death penalty or to seek conviction, their interest on behalf of their private clients are inevitably different than the interest of the public official that is elected to apply the laws

fairly and impartially, and certain states have so found. Wisconsin has struck down a similar provision. Missouri has struck down a similar provision. In murder cases, Your Honor, in which the verdict came back guilty the Supreme Courts in those states reversed on the gounds [sic] that this combination is really just unfair. The words of those Courts have already been cited to Your Honor and I need not dwell upon them. But it is essentially that to the effect that public wrongs should be prosecuted by public officials, private wrongs by private parties. In this particular case if we proceed in this fashion we'll be voir direing the jury that may well be known to the chairman of the Republic Party, to a leading member of the Democratic Party, in a county with a relatively small population, with a -- as

we understand it, total electoral roll of some thirty-nine thousand people, many of whom who participate in public electoins [sic] and might well be known to these fine attorneys. We think this is a dangerous practice. It's loading the odds. It's not fair to do it and it's unnecessary to do it. And rather than have the Supreme Court or any Court have to review this down the line, the appropriate things is to head it off here and now. And we respectfully request the Court to do so on behalf of these individuals who face trial at the hands of the State.

THE COURT: Mr. Black.

MR. BLACK: Nothing further, Your Honor.

THE COURT: General, what to you say for the State?

MR. HAWKINS: If the Court please, we can certainly take time to talk about Mr. Fels and Mr. Black. The Court, I know, is well aware of the ability of Mr. Black. He is a fine trial attorney and one of the best in this part of the State or this party of the Country. The Court is well aware -- Mr. Black being in this county and having represented many, many criminal Defendants. And Mr. Fels -- I appreciate the comments Mr. Fels had about us, but Mr. Fels for many, many years, as the Court may be aware, was the Assistant U.S. Attorney. He handled all types of criminal prosecutions. He is the one who is most closely associated with prosecuting in this part of Tennessee many sheriffs, many high officials of government who were involved in corruption and the dealing of drugs, and one of the finest and best

prosecutors that I've ever had the pleasure of knowing. And he also is one of the best and efficient defense attorneys it's been my pleasure to know. Mr. Fels should not and will not, and of course during the proceedings and during the trial, take a back seat to anyone. And I noticed these two fine attorneys here, and they also earlier today has their private investigator with them. This isn't going to be a contest of four lawyers against one, or four lawyers against two, or as Mr. Fels puts it, a shooting fish in a barrel. This will be a case where I am sure on behalf of the Defendants all the material facts on their side will come out, all of the witnesses that could have been called will be called, all of the experts will analyze the evidence that in their opinion should analyze the evidence. Let me go

further with regard to this, as the evidence before the Court is that Mr. Cunningham and Mr. Thomas have been asked to assist in the prosecution and they have done so by the statute that the Tennessee Legislature has passed. They serve at the discretion of the District Attorney. And as by the tactics, the matters of investigation, the matters of Rule 16 Discovery, and all the rules that pertain to handling this Defendant in a fair and non-prejudicial manner, and keeping with the Constitution of Tennessee, rest on the shoulders of the District Attorney General's Office. That's the way it has been up to this point and that's the way it has been through the -- and that's the way it will be through the trial. Mr. Cunningham -- we're glad to have Mr. Cunningham and Mr. Thomas assisting us as

means of that statute. We believe the statute is Constitutional. As this Court well knows even before this statute was passed, at least in in this jurisdiction, private prosecutors were allowed to help and assist the District Attorney General's Office. We believe the statute is Constitutional. That the rights of this Defendant will be protected by the Court, by his lawyers and in keeping with the prosecutoral [sic] standards of the District Attorney General's Office and by those standards which have been announced previously. We ask the Court to overrule the motion.

THE COURT: Now, let me be sure -- Mr. Fels, you have covered all three motions in your opening argument?

MR. FELS: Yes, Thank you, Your Honor.

THE COURT: Do you have any closing argument to make in the matter?

MR. FELS: Nothing further. Thank you, Your Honor.

THE COURT: Prior to the 1978 statute it was certainly a custom in this part of Tennessee for private citizens to employ a private attorney to prosecute criminal matters. And sometimes the District Attorney or one of his Assistant in fact participated in that prosecution in the Courtroom and sometimes they did not, depending on the office and the jurisdiction of the particular case. Of course history does not overcome a Constitutional defect, if there be one. In 1978 the Legislature enacted the following: "A victim of a crime or the family members of a victim of crime may employ private counsel to act as co-counsel with the

District Attorney General or his deputies in trying cases with the extent of participation of such privately employed counsel being at the discretion of the District Attorney General. The District Attorney General or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the District Attonrey [sic] General of his employment." Now, a number of arguments have been made as to the unconstitutionality or impropriety of having private counsel in this case, one of them the Court notes with interest is that a jury may perceive a greater number and possibly an enlarged quality in the prosecution. That may or may not be so. The Court does not believe that that is a matter that rises to a Constitutional level. It has been perceived by attorneys

in both criminal and civil matters that sometimes it is to the detriment of a party to have too much counsel in appearance and sitting on one side of the Courtroom because it will have the exact opposite effect of giving the other side the appearance of the underdog, and therefore have the sympathy of the jury that is trying the case. I can remember that being discussed in a number of cases, and although a lawyer might like to take his usual place on one side of the Courtroom, he was instructed not to, so that there would not be -- appear to be too much manpower on one side of the Courtroom. But it appears at this point that General Ballard and General Hawkins and Mr. Cunningham and Mr. Thomas will be here in this case. The Court does not find that the three motions have merit and overrules

them at this time. The Court also observed that Mr. Fels is probably correct that it will be more difficult to select a jury because there will be many more people who know Mr. Thomas and Mr. Cunningham in one way or another, and will increase the probability that there may be challenges for cause with a larger number of the prospective veniremen, but the Court doesn't believe that it can overrule the Legislature on the basis of that increased difficulty for the Court in getting the matter quickly to trial. Now, gentlemen, I believe this brings us the Motion for Change of Venue. And in that regard, Mr. Black, are you also asking for a change of venue?

MR. BLACK: Yes, Your Honor.

THE COURT: Very well. Let me ask you -- you do intend to offer evidence in this motion?

MR. FELS: Yes, Your Honor. I have two brief witness and I have an affidavit to submit to the Court.

THE COURT: I was going to ask by what means -- you have two witnesses?

MR. FELS: Two witnesses and an affidavit. Thank you, Your Honor.

THE COURT: Very well. If you will call your first witness.

MR. FELS: Thank you.